UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re:

DOUGLAS S. SWATOWSKI, Case No. 6:16-bk-04018-RAC

Debtor. Chapter 7

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SEACOAST NATIONAL BANK,

Plaintiff,

v. Adv. Proc. No. 6:16-ap-00131-RAC

DOUGLAS S. SWATOWSKI,

Defendant.

______________________________________/

MOTION TO DISMISS AMENDED COMPLAINT
TO DETERMINE DISCHARGEABILITY OF DEBT AND OBJECTION TO DISCHARGE

COMES NOW Defendant, DOUGLAS S. SWATOWSKI ("Defendant" or "Debtor"), and moves pursuant to Rule 12, Federal Rules of Civil Procedure ("Civil Rules"), as incorporated by Rule 7012, Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"), to dismiss the Amended Complaint to Determine Dischargeability of Debt and Objection to Discharge ("Complaint") filed by Plaintiff, SEACOST NATIONAL BANK ("Plaintiff"), on February 15, 2015, for failure to state a claim upon which relief can be granted, and in support thereof states as follows:

FACTS ALLEGED IN COMPLAINT

1. In the Complaint, Plaintiff alleges that Debtor owes it money based on loans and refinancing agreements that were entered into from 2011 to 2013. *See* ¶¶ 11 and 18 of the Complaint (the "Loan Debt").

2. The Loan Debt was secured by real property different from the Debtor's homestead.

3. Foreclosure proceedings in the state court resulted in a deficiency judgment entered November 30, 2015, amended on December 7, 2015, which liquidated the Loan Debt in the amount of approximately $566,773.56.

4. Although a copy of the alleged deficiency judgment is not attached to the Complaint, the Judgment of Foreclosure that is attached to the Complaint as Exhibit E was entered against the Debtor and certain business entities. Plaintiff does not allege that either the Judgment of Foreclosure or the alleged deficiency judgment were entered against Kimberly Swatowski, the Debtor's wife, a non-debtor.

5. In the Complaint, in relevant part, Plaintiff seeks to except the alleged Loan Debt from discharge on four grounds. In Count I, Plaintiff seeks to except the Loan Debt from discharge based on 11 U.S.C. § 523(a)(2)(A) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. Count I is based entirely on an alleged misrepresentation purportedly made to a third party closing agent—**not** this Plaintiff—contained in a Non-Identity Affidavit signed on November 3, 2014, which is attached to the Complaint as Exhibit F (the "Affidavit").

6. In Count II, Plaintiff seeks to except the Loan Debt from discharge based on 11 U.S.C. § 523(a)(6) for willful and malicious injury by the debtor to another entity or to the property of another entity. Count II is also based entirely on the Affidavit.

7. Plaintiff alleges that Debtor falsely represented in the Affidavit that there were no claims pending against "him" at the time of closing on the sale of his homestead property.[1]

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[1] Plaintiff alleges in the Complaint that the property was no longer homestead at the time it was sold. Defendant disputes this assertion and avers that the property was in fact his homestead property at the time it was sold.

Plaintiff also objects to the Debtor's discharge pursuant to 11 U.S.C. § 727(a) (Count V) based in part on this alleged falsity in the Affidavit.

8. However, a review of the Affidavit reveals that it actually states in relevant part as follows:

> [A]ffiant, **Douglas Swatowski**, is aware that there are many judgments, orders, tax liens, and decress for money filed against similar name in the Public Records, but that affiant has no personal knowledge of any claims filed against **her** name.

Non-Identity Affidavit (Exhibit F) at ¶ 2 (emphasis added).

9. Contrary to the allegations in the Complaint, the Affidavit does not state that there were no claims pending *him.* Rather, the Affidavit states that there were no claims pending against *her*.

10. With respect to the remaining claims in the Complaint, Count III seeks to except the Loan Debt from discharge under § 523(a)(2)(A) based on an allegedly fraudulent transfer from the Debtor to his wife of certain real estate sale proceeds from the sale of Debtor and his wife's previous homestead. Plaintiff also alleges that the substantial portion of these proceeds were re-invested into the Debtor and wife's subsequent homestead. *See* Complaint at ¶ 37.

11. Count IV seeks to except the Loan Debt from discharge under § 523(a)(2)(A) based on an allegedly fraudulent transfer of the Debtor's alleged interest in a personal tort claim arising from injuries allegedly suffered by his wife in 2012. Plaintiff does not allege the exact nature of this purported tort claim, but does allege that Debtor testified that he did not have any claim related to it, and that he had no knowledge of the personal tort claim. *See* Complaint at ¶ 43.

Nevertheless, for purposes of this Motion to Dismiss, Defendant recognizes that the Court must accept the allegations in the Complaint as true. Even accepting these allegations as true, however, the Complaint still fails to state a claim because Plaintiff has failed to allege a misrepresentation or any willful or malicious injury, since the allegations of misrepresentation and willful or malicious injury are contradicted by the Affidavit that is attached to the Complaint as Exhibit F.

12. Count V seeks to deny the Debtor a discharge under § 727(a). The precise grounds on which denial of discharge is sought are not clearly alleged in Count V. Paragraph 77 of the Complaint cites § 727(a)(1), but quotes language from § 727(a)(2) (denying discharge for transfer, removal, or concealment of property with intent to hinder, delay, or defraud a creditor), and fails to identify the exact property that Plaintiff contends was transferred, removed, or concealed. Similarly, Paragraph 78 of the Complaint refers to § 727(a)(3), but fails to allege what documents or recorded information has been concealed, destroyed, falsified, or failed to have been kept. And Paragraph 79 refers to § 727(a)(4), but fails to allege false oath was supposedly made, or where on the Schedules Debtor was required to disclose it.

LEGAL ARGUMENT

13. As more fully argued below, all Counts of the Complaint should be dismissed.

14. Counts I and II should be dismissed because they are based entirely on the Affidavit, which does not actually contain the misrepresentations Plaintiff alleges, and which Plaintiff does not allege that it relied upon in making the Loan Debt. Indeed, Plaintiff could not in good faith claim to have relied upon the Affidavit since the Debtor executed that document in November 2014, years **after** the Plaintiff extended the underlying Loan Debt at issue. *See* Complaint at ¶ 11.

15. Counts III and IV should be dismissed because they seek to except the Loan Debt from discharge under § 523(a) based on allegedly fraudulent transfers which did not result in and are not traceable to the Loan Debt and which allegedly occurred years **after** Plaintiff extended the Loan Debt to Debtor. Those fraudulent transfers cannot render the Loan Debt non-dischargeable based on the case law on which Plaintiff relies in the Complaint or under any other cognizable theory.

16. Count V should be dismissed because the alleged transfer at issue plainly does not give rise to a claim under § 727 since the Compliant itself alleges that the transfer occurred more than one year prior to the Petition Date. Further, the Complaint fails to clearly allege the grounds on which it is seeking a denial of discharge; fails to identify any property that was allegedly transferred or hidden; fails to allege the records that Debtor supposedly destroyed or did not maintain; fails to allege what Debtor supposedly did not disclose; and otherwise fails on its face to allege even the most basic and straightforward elements of a claim under § 727.

Counts I and II Fail to Allege a Misrepresentation, Justifiable Reliance, or Damages

17. Counts I and II should be dismissed because the Complaint fails to allege (i) a misrepresentation, (ii) justifiable reliance, or (iii) that the fraud resulted in a loss in the form of the Loan Debt.

18. The elements of a claim under § 523(a)(2)(A) are (1) the debtor made a false representation with the intention of deceiving the creditor; (2) the creditor relied on the false representation; (3) the reliance was justified; and (4) the creditor sustained a loss as a result of the false representation. *Stewart Title Guaranty Co. v. Roberts-Dude (In re Roberts-Dude)*, 597 Fed. App'x 615, 617 (11th Cir. 2015) (citing *In re Bilzerian*, 153 F. 3d 1278, 1281 (11th Cir. 1998)).

19. Pursuant to Civil Rule 10(c), as incorporated by Bankruptcy Rule 7010, "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

20. "'Under Rule 10(c), Federal Rules of Civil Procedure, such attachments are considered part of the pleading for all purposes, including a Rule 12(b)(6) motion.'" *Hamilton v. State Farm Mut. Auto. Ins. Co.*, 2013 WL 5231483, at *1 (M.D. Fla. Sept. 16, 2013) (quoting *Solis-Ramirez v. U.S. Dept. of Justice*, 758 F.2d 1426, 1430 (11th Cir. 1985)).

21. "'Where there is a conflict between allegations in a pleading and exhibits thereto, it is well settled that the exhibits control.'" *Griffin Industries, Inc. v. Irvin*, 496 F.3 1189, 1206 (11th Cir. 2007) (quoting *Simmons v. Peavy-Welsh Lumber Co.*, 113 F.2d 812, 813 (5th Cir. 1940)).

22. The Court's "duty to accept the facts in the complaint as true does not require us to ignore specific factual details of the pleading in favor of general or conclusory allegations. Indeed, when the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern." *Griffin Industries,* 496 F.3 at 1205-06 (emphasis added); *see also Crowe v. Moran (In re Moran)*, 413 B.R. 169, 177 (Bankr. D. Del. 2009) (explaining that, "if the allegations of [the] complaint are contradicted by the documents made a part thereof, the documents control and the Court need not accept as true the allegations of the complaint"); *Marcus Lee Assoc., L.P. v. Wachovia Bank, N.A. (In re Marcus Lee Assoc., L.P.)*, 422 B.R. 21, 39 (Bankr. E.D. Pa. 2009).

23. In this case, Counts I and II of the Complaint are based entirely on the allegation that Debtor made a misrepresentation in the Affidavit. Count V is also based in part on alleged misrepresentations in the Affidavit. However, the Affidavit attached to the Complaint does not actually contain any misrepresentations.

24. More specifically, Plaintiff alleges that Debtor misrepresented in the Affidavit that there were no pending claims against "him" at the time of closing. However, that is not what the Non-Identity Affidavit says. In fact, the Affidavit says that Debtor "has no personal knowledge of any claims filed against **her** name," presumably referring to the Debtor's wife (emphasis added).

25. Contrary to the allegations in the Complaint, the Affidavit does not contain any misrepresentations. Without a clear misrepresentation, the Affidavit cannot serve as the basis to except Plaintiff's debt from discharge under §§ 523(a)(2) or 523(a)(6), nor can it serve a basis to

deny the Debtor a discharge under § 727(a). Accordingly, Counts I, II, and V of the Complaint fail to state a claim on which relief can be granted.

26. Although Plaintiff alleges in Footnote 1 to Paragraph 25 that there was a "scrivener's error" in the Affidavit, Plaintiff cannot retroactively—and unilaterally—change the contents of the Affidavit that *it* prepared, and which it presented to Debtor for signature. By claiming a "scrivener's error," Plaintiff is attempting to change Debtor's representations after the fact, to say something that Plaintiff wanted Debtor to attest to, but which the Affidavit does not actually contain. A creditor cannot retroactively create a misrepresentation in this manner.

27. In addition, Plaintiff has not alleged that the Loan Debt—extended years before Debtor executed the Affidavit—was "obtained by" fraud. *See* 11 U.S.C. § 523(a)(2)(A) (excepting from discharge "money, property, services, or an extension, renewal, or refinancing of credit to the extent **obtained by** . . . false pretenses, a false representation, or actual fraud . . ."). In other words, Plaintiff fails to allege (and could not in good faith allege) that it justifiably relied upon the Affidavit, an essential element of a claim under § 523(a)(2)(A). *See Roberts-Dude*, 597 Fed. App'x at 617.

28. Indeed, Plaintiff cannot allege justifiable reliance in this case because the Debtor obtained, and Plaintiff extended, the Loan Debt (i.e., the deficiency judgment that Plaintiff is seeking except from discharge ***before*** Debtor made the allegedly false statements in the Affidavit. Based on the allegations in the Complaint, Plaintiff could not have relied upon the Affidavit in making the Loan Debt that Plaintiff is seeking to except from discharge.

29. Furthermore, Plaintiff has not alleged how the alleged misrepresentations caused it any loss. The proceeds from the sale of the exempt homestead are themselves exempt. *See, e.g.*, *In re Dezonia*, 347 B.R. 920 (Bankr. M.D. Fla. 2006); *In re Binko*, 258 B.R. 515 (Bankr. S.D. Fla.

2001); *In re Harrison*, 236 B.R. 784 (Bankr. M.D. Fla. 1999); *In re Gilley*, 236 B.R. 441 (Bankr. M.D. Fla. 1999); *Malone v. Short (In re Short)*, 188 B.R. 857 (Bankr. M.D. Fla. 1995). Plaintiff has alleged that the substantial portion of the proceeds from the sale of Debtor and his wife's previous homestead were reinvested into their new homestead. *See* Complaint at ¶ 37. Since the proceeds from the sale of the homestead are exempt, and the substantial portion of those proceeds were reinvested into the new homestead, Plaintiff has not alleged that it suffered any loss as a result of the purported misrepresentation.

30. For these reasons, Counts I and II should be dismissed.

Counts III and IV Fail to Allege a Debt "Obtained By" Fraud

31. In both Counts III and IV, Plaintiff relies on recent United States Supreme Court case law as the basis for excepting the Loan Debt from discharge under § 523(a)(2)(A). Specifically, Plaintiff relies on *Husky Int'l Elec., Inc. v Ritz*, 136 S. Ct. 1581 (2016) for the proposition that "the term 'actual fraud' in Section 523(a)(2)(A) of the Bankruptcy Code encompasses fraudulent conveyance schemes, even when those schemes do not involve a false representation by a debtor." Complaint at ¶¶ 63, 73.

32. In actuality, the holding of *Husky* is much more circumscribed than Plaintiff suggests. *Husky* held only that "actual fraud" under § 523(a)(2)(A) does not require an overt misrepresentation. Moreover, *Husky* makes clear that only the transfer**ee** in a fraudulent conveyance scheme is subject to the discharge exception under § 523(a)(2)(A):

> It is of course true that the transferor does not "obtai[n]" debts in a fraudulent conveyance. But the recipient of the transfer—who, with the requisite intent, also commits fraud—can "obtai[n]" assets "by" his or her participation in the fraud. See, *e.g.*, *McClellan* v. *Cantrell*, 217 F.3d 890 (C.A.7 2000); see also *supra*, at 1587 – 1588. If that recipient later files for bankruptcy, any debts "traceable to" the fraudulent conveyance, see *Field*, 516 U.S. at 61, 116 S. Ct. 437; *post*, at 1591, will be nondischargable under § 523(a)(2)(A). Thus, at least sometimes a debt "obtained by" a fraudulent conveyance scheme could be nondischargeable under

> § 523(a)(2)(A). Such circumstances may be rare because a person who receives fraudulently conveyed assets is not necessarily (or even likely to be) a debtor on the verge of bankruptcy,[ ] but they make clear that fraudulent conveyances are not wholly incompatible with the "obtained by" requirement.

Husky, 136 S. Ct. at 1589.

33. As the Supreme Court makes clear in *Husky*, only the **recipient** of the fraudulent transfer is potentially subject to the discharge exception in § 523(a)(2)(A) recognized by that case. This is because it is only the recipient of the property (as opposed to the transferor) that receives the property or debt that was "obtained by" the fraud. Plaintiff has not alleged that Debtor was the recipient of the fraudulent transfer; rather, Plaintiff alleges that Debtor was the **transferor**. Such allegations fail to state a claim under *Husky*.

34. Plaintiff attempts to address this issue in Paragraph 75 of the Complaint, by alleging that "the resulting debt arising from the Debtor's fraudulent conveyance of his portion of the personal tort / consortium claim (and its proceeds)" is not dischargeable under § 523(a)(2)(A). While Plaintiff fails to allege anywhere in the Complaint what that "resulting debt" is,[2] the only "debt" that could plausibly "result" from an alleged fraudulent transfer to Debtor's wife would be a debt owed by **the wife** on account of her receiving of the transfer (as occurred in *Husky*). But unlike the facts in *Husky*, Debtor's wife is not a party to this action and **is not even a debtor in bankruptcy**. So, Plaintiff's allegation—that the "resulting debt" arising from the wife's receipt of an alleged transfer is non-dischargeable under § 523(a)(2)(A)—even if accepted as true, is totally irrelevant and, in all events, does not form a cognizable cause of action under § 523(a)(2)(A) against **this Debtor** under *Husky*. The *Husky* case is limited to transferees, and since Plaintiff does

[2] It cannot be the Loan Debt, because the Complaint alleges that the Loan Debt was incurred *prior* to the purported fraudulent conveyance of the "personal tort / consortium claim."

not allege that Debtor was the transferee of the allegedly fraudulent transfers, it has not stated a claim under § 523(a)(2)(A).

35. This conclusion is buttressed by the fact that there are no allegations that the Loan Debt resulted from or is traceable to the purported fraudulent transfers of the proceeds from the subsequent sale of the homestead, or the Debtor's purported interest in the alleged "personal tort" suffered by the Debtor's wife. *See Field v. Mans*, 516 U.S. 59, 64, 116 S. Ct. 437 (1995) (requiring the debt to be "traceable to" the fraud to be excepted from discharge under § 523(a)(2)(A)). Nor does Plaintiff allege reliance on these transfers in making the Loan Debt. Without such allegations, Plaintiff has not stated a claim under § 523(a)(2)(A) with respect to the purported fraudulent conveyances, as alleged in Counts III and IV, and thus both of those Counts should be dismissed.

Count V Fails to Allege Essential Elements

36. As explained above, Count V fails to allege clearly the grounds on which Plaintiff is seeking to deny Debtor a discharge under § 727(a).

37. Paragraphs 77 and 81 cite § 727(a)(1), but quote § 727(a)(2), and then fail to identify what property was allegedly transferred, removed, or concealed with the intent to hinder, delay, or defraud. Without alleging what, exactly, was transferred or concealed, and that such transfer or concealment occurred within one year of the filing of the petition, Plaintiff fails state a claim under § 727(a)(2). Moreover, all of the alleged transfers identified elsewhere in the Complaint (though not referenced in Count V) occurred well outside of the one-year lookback period applicable under § 727(a)(2), so the Count V fails as a matter of law on the face of the Complaint to the extent the "transfer" at issue in that Count V was intended to be any of the fraudulent transfers alleged elsewhere in the Complaint.

38. Paragraph 78 attempts to state a claim under § 727(a)(3); however, Plaintiff fails to allege what documents or records that Debtor is supposed to have concealed, destroyed, or falsified. Without such allegations, Plaintiff fails to state a claim under § 727(a)(3).

39. Paragraph 79 attempts to state a claim under § 727(a)(4); however, Plaintiff fails to allege what Debtor failed to disclose or where in his Bankruptcy Schedules he should have disclosed it. In fact, Plaintiff alleges in Paragraph 43 that Debtor testified that he did not have a claim related to the alleged "personal tort" suffered by his wife, and that Debtor had no knowledge of the personal tort claim. A debtor cannot disclose a claim he does not have. In addition, Plaintiff alleges that Debtor failed to disclose accurate information in his Petition or Schedules regarding his alleged interest in his wife's "personal tort / consortium claim," but that transfer alleged occurred in 2012, at least four years prior to the Petition Date. Nothing in the Petition or Schedules requires a debtor in bankruptcy to disclose transfers that occurred four years ago, so the alleged failure to disclose a transfer of any such interest, even if it occurred, would be non-actionable under § 727(a)(4).

40. Without alleging the precise factual grounds on which Plaintiff's § 727(a) claim is based, Debtor cannot defend against the claim and will be severely prejudiced in this case.

41. For these reasons, Plaintiff has failed to state a claim under § 727(a) to deny the Debtor's discharge.

Conclusion

42. For the foregoing reasons, all Counts of the Complaint fail to state a claim upon which relief can be granted.

WHEREFORE Defendant, DOUGLAS S. SWATOWSKI prays that the Court will enter an order dismissing the Amended Complaint to Determine Dischargeability of Debt and Objection to Discharge filed by Plaintiff, SEACOST NATIONAL BANK, and for such other relief that the Court deems just and equitable.

Respectfully submitted this 14th day of March, 2017.

/s/ Jeffrey S. Ainsworth
JEFFREY S. AINSWORTH, ESQ.
Florida Bar No. 60769
BransonLaw, PLLC
1501 E. Concord St.
Orlando, FL 32803
Phone: 407-894-6834
Fax: 407-894-8559
E-mail: Jeff@Bransonlaw.com
Attorneys for Defendant, DOUGLAS S. SWATOWSKI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of March, 2017, a true and correct copy of the foregoing has been provided electronically via the Court's CM/ECF Filing System to Jon E. Kane, Esq. (jkane@mateerharbert.com), and all other recipients registered to received electronic notice.

/s/ Jeffrey S. Ainsworth
JEFFREY S. AINSWORTH, ESQ.
Florida Bar No. 60769